LIBRARY
SUPREME COURT, U. S.

SUPREME COURT, U. S.
FILED
APR 7 1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1087

MOSES MILLS,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

PETITION FOR WRIT OF CERTIORARI FROM THE COURT OF SPECIAL APPEALS OF MARYLAND

MORRIS LEE KAPLAN
1305 Court Square Building
Baltimore, Maryland 21202
539-5224

MICHAEL LEE KAPLAN
1305 Court Qsuare Building
Baltimore, Maryland 21202
539-5224

Attorneys for Petitioner

TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
REASONS FOR GRANTING THE WRIT	2
STATEMENT OF QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
ARGUMENT	
I. The Court of Special Appeals of Maryland Denied the Petitioner the Protection of the Fourth Amendment of the Constitution of the United States by Affirming the Lower Court's Decision on the Motion to Suppress the Evidence and the Arrest and Conviction of the Petitioner was Legal	5
CONCLUSION	10
APPENDIX A—Opinion of the Court of Special Appeals of Maryland	1a
APPENDIX B—Order of the Court of Special Appeals of Maryland	1b

TABLE OF AUTHORITIES

Constitutional Provisions:

Fourth Amendment 2, 3, 5, 9, 10

28 U.S.C.S. 1257 (3) 2

Rules of Procedure:

Maryland Rules of Procedure, 1972 Edition, Rule 1012 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

MOSES MILLS,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

PETITION FOR WRIT OF CERTIORARI FROM THE COURT OF SPECIAL APPEALS OF MARYLAND

Moses Mills; Petitioner, prays that a Writ of Certiorari be issued to review the judgment of the Court of Special Appeals of Maryland entered June 30, 1971 affirming the convictions as to Indictment 6956, 6957 and 8858 (except as to the sentence in 8858) of the 1969 Docket, Criminal Court of Baltimore City, in the case of Moses Mills, Appellant v. State of Maryland, Appellee, September Term, 1970, No. 554.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Special Appeals of Maryland is reported 12 Md. App. 449 and is included as Appendix A to this Petition. The order of the Court of Appeals of Maryland is unreported and is attached as Appendix B hereto.

JURISDICTION

The judgment of the Court of Special Appeals of Maryland sought to be reviewed was filed on June 30, 1971. The Order of the Court of Appeals of Maryland denying the Petition for Writ of Certiorari was entered on November 9, 1971. That a Petition For An Extension of Time to File a Writ of Certiorari to the Supreme Court was granted by the Court on February 4, 1972. The jurisdiction of this Court is invoked under 28 U.S.C.S. 1257.(3).

REASONS FOR WRIT

Petitioner, as reasons why the issuance of such a Writ is desirable and in the public interest asserts:

A. That the Petitioner is entitled to the protection of the Fourth Amendment of the Constitution of the United States and the failure of the Court to protect this right created a constitutional prejudicial error.

(1) In that a person must be properly arrested and that a search of a premises in which it has an interest must also be proper or the protection of a person and the person's property is afforded under the Fourth Amendment of the Constitution is being deined to that individual.

STATEMENT OF QUESTIONS PRESENTED

The public interest is the administration of Criminal justice calls for a determination by the Court of the issue presented in this case. The issue is whether or not a constitutional violation contributed to the conviction of the Petitioner in the indictments in which he was charged.

The question presented here is whether the Court of Special Appeals of Maryland denied the Petitioner's rights under the Fourth Amendment of the Constitution of the United States in affirming the conviction in Indictment Nos. 6956/69 and 6957/69 in that the Petitioner's rights were violated because a premises in which he had standing was improperly searched and that as a result of the most improper search, the Petitioner was improperly arrested.

STATEMENT OF THE CASE

The Petitioner, Moses Mills, was indicted by the Grand Jury of Baltimore City on October 7, 1969, for the violation of the Narcotic Laws of the State of Maryland. He was charged with three indictments. No. 6956/69 charging him with a conspiracy to violate the narcotic law; No. 6957/69 charging him with a conspiracy to keep and maintain a nuisance house in violation of the narcotic laws; and No. 8858/69 charging him with a conspiracy to violate the narcotic laws in reference to barbituates.

The Petitioner elected a jury trial before the Honorable Charles Harris. Prior to going to trial before Judge Harris, with a jury, the Defendant had been called for trial before Judge J. Gilbert Prendergast on April 6, 1970, on these indictments and elected trial by jury. Before the Jury was drawn, the Defendant asked the Court to rule on several Motions.

One of the Motions considered by Judge Prendergast was a Motion to Quash the Warrants and Suppress the Evidence in the cases involved in Indictment Nos. 6956/69 and 6957/69.

The cases to be prosecuted by the State involved a series of raids and/or arrests that were made on January 22, 1969, and an arrest on May 16, 1969. The Court ruled that at the time it had considered the testimony offered by the State, it could not grant the Motions to Suppress the Evidence as against Mills but would reserve the right to reconsider after hearing additional testimony. The Court ruled

that the Warrants were defective and should be quashed but could not determine from the meager testimony, the question as to the Defendant's proprietary interest in the contraband to be offered in evidence, whether Mr. Mills had the right to object and become the beneficiary of the Court's ruling.

On the warrantless arrest (No. 8858/69), Judge Prendergast held that the evidence could be introduced. After his rulings, the learned Judge felt that the case should go over to the following Monday. It did not as Judge Pendergast was not available, and it was then heard by Judge Harris, with a jury.

Counsel for the Defendant advised the Court that Judge Prendergast had not made a final determination on his Motions to Suppress the Evidence and that he would renew his Motions at the proper time. He did and the Court overruled the Motions.

The Defendant was found guilty on the three indictments and sentenced to nine (9) years and a fine of One Thousand ($1,000.00) Dollars in Indictment No. 6956, a term of five (5) years and a fine of One Thousand ($1,000.00) Dollars in Indictment No. 6957 to run consecutively with Indictment No. 6956, and a term of five (5) years and a fine of Two Thousand ($2,000.00) Dollars on Indictment No. 8858. The fine was consecurive with fines imposed in Indictment Nos. 6956 and 6957; and the term of five years to run concurrently with the other sentences on Indictments 6956 and 6957. The Petitioner entered an Appeal on June 12, 1970 to the Court of Special Appeals of Maryland. The judgment of the Court of Special Appeals sought to be reviewed which affirmed the decision of the lower Court (except the sentence in Indictment No. 8858 was reduced to One (1) year) was filed on the 30th day of June, 1971. A Writ of Certiorari was taken to the Court of Appeals of Maryland which was denied on November 9, 1971.

ARGUMENT

I.

THE COURT OF SPECIAL APPEALS OF MARYLAND DENIED THE PETITIONER THE PROTECTION OF THE FOURTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES BY AFFIRMING THE LOWER COURT'S DECISION ON THE MOTION TO SUPPRESS THE EVIDENCE AND THAT THE ARREST AND CONVICTION OF THE PETITIONER WERE LEGAL.

The Petitioner in this case claims that the search of 2010 Brunt Street was illegal and that he was illegally arrested. The Petitioner's rights as to the search of the premises in which he had a standing or proprietary interest and his arrest which are protected by the Fourth Amendment of the Constitution of the United States were not protected by the lower Court or the Court of Special Appeals of Maryland but that their rulings amounted to a constitutional prejudicial error which resulted in his conviction in Indictments Nos. 6956/69 and 6957/69.

The factual situation in the Petitioner's case which will show that both the lower Court and the Court of Special Appeals of Maryland both made a prejudicial error will be stated to the Court briefly.

The trial of the Petitioner started on April 6, 1970, before Judge Prendergast in the Criminal Court of Baltimore City at which time the Judge ruled on the Motion to Quash the Warrant and Suppress the Evidence in Indictment Nos. 6956/69 and 6957/69. Judge Prendergast ruled that the Warrants should be quashed and that the evidence couldn't be admitted into evidence in Indictments Nos. 6956/69 and 6957/69 as to the other Defendants but not as to Mills. The Judge said he could not rule on the Motion to Suppress the Evidence as to Mills because he could not determine if Mills had a proprietary interest in the contraband to be offered in evidence. The case was held over till Monday morning but when Judge Prendergast was unavailable, the case was heard by Judge Harris with a jury.

No evidence seized by the raids and arrests were found on Mills. Nor was he arrested as a result of the raids. This left the legal question whether the evidence seized at these raids could be admitted against Mills and whether Mills had a standing or proprietary interest in the evidence. The Defendant's contention was that he had a standing or proprietary interest.

Counsel for the Defendant asked Judge Harris to make a final determination on the Motion to Suppress the Evidence at the proper time and the Court overruled the Motions.

The Defendant felt that the lower Court errored in ruling on the Motion to Suppress the Evidence because he did have a standing or proprietary interest in 2010 Brunt Street. This question was presented to the Court of Special Appeals of Maryland as a result of an Appeal filed in these cases on June 12, 1970.

The Court of Special Appeals affirmed the lower Court's decision to overrule the Motion to Suppress the evidence. The Court ruled that Mills had a standing or proprietary interest in 2010 Brunt Street but that Judge Prendergast had made an improper ruling in Quashing the Warrant and Suppressing the Evidence as to the other defendants in Indictment Nos. 6956/69 and 6957/69.

The Court of Special Appeals affirmed the lower Court's decision to overrule the Motion to Suppress the Evidence. The Court ruled in its opinion that the Defendant had standing to challenge the searches; found on page 4 of the Court's opinion:

> "We think appellant had standing to challenge the searches. In *Walters v. State*, 8 Md. App. 583, we noted that the stake one need possess in searched premises to object to evidence seized therefrom had been discussed in *Jones v. United States*, 362 U.S. 257, and that *Jones* generally held that aside from the owner or one who has a right of possession in the premises, anyone legitimately on the premises

> searched has standing to object. The "legitimately present non-owner" doctrine has generated much discussion. See *Middleton v. State*, 10 Md. App. 18; *Anderson v. State*, 9 Md. App. 532; *Kleinbart v. State*, 2 Md. App. 183. *Jones* cannot fairly be read to constrict the standing of one having a strong possessory and/or controlling interest in searched premises, but who was not present while the search was being conducted. See *Mancusi v. Deforte*, 392 U.S. 364, and *United States v. Jeffers*, 342 U.S. 48. The evidence indicated that appellant exercised control over the searched premises, giving rise to an inference that no activities would occur there without permission or over his objection. Therefore, as in *Mancusi*, appellant had a reasonable expectation of privacy with respect to the activities and items within the searched premises. This expectation of privacy is afforded Fourth Amendment protection notwithstanding appellant's inability to show title (*United States v. Jeffers, supra*) or because of the commercial form of the activity conducted on the premises (*Wilson v. United States*, 221 U.S. 361). See also *Katz v. United States*, 389 U.S. 347.

The Court of Special Appeals then stated that Judge Prendergast made an incorrect ruling on the Motion to Quash the Warrants and Suppress the Evidence and the Court's opinion gave its reasons as follows:

> "We hold, however, that appellant's standing to object to the introduction of the seized evidence is of no consequence in this case, since we believe that the untimely return of a search warrant under Rule 707 c is no basis for excluding evidence seized under otherwise validly issued and executed warrants.
>
> In *Fitez v. State*, 9 Md. App. 137, we held that the purpose and policies behind Maryland Rule 707 a and b (inventory and service of copy) were properly served by viewing those provisions as ministerial, and that a technical violation of those Rules would not preclude admission of evidence seized under otherwise lawfully obtained search warrants.

Maryland Rule 707 c provides:

> 'The search warrant shall be returned to the issuing judge, or in his absence to another judge of the same circuit in which the search warrant was issued, as promptly as possible and in any event within five days from the date the search warrant was executed or within such earlier time as may be set forth in the search warrant for its return. The return shall be accompanied by a copy of the inventory made pursuant to section a of this Rule.'

The marked similarity in form and substance between Maryland Rule 707 c and provisions in other jurisdictions requiring the timely return of a search warrant is readily evident from the most cursory research. The decision in those other jurisdictions almost uniformly hold that the return of a warrant is a ministerial act and that failure to comply with the return requirement does not render the search warrant defective or the seizure invalid. See *United States v. Haskins*, 354 F.2d 111 (6th Cir.); *Evans v. United States*, 242 F.2d 534 (6th Cir.); *United States v. Averell*, 296 F. Supp. 1004 (E.D. N.Y.); *United States v. Romano*, 203 F. Supp. 27 (D.C. Conn.); *United States v. Gross*, 137 F. Supp. 244 (S.D.N.Y.); *United States v. Baldwin*, 46 F.R.D. 63 (S.D.N.Y.); *People v. Hawthorne*, 258 N.E. 2d 319 (Ill.); *State v. Hunt*, 454 S.W. 2d 555 (Mo.); *People v. Schmidt*, 473 P.2d 698 (Col.).

Procedural requirements in connection with search warrants are ordinarily intended to safeguard the constitutional right of the individual against unreasonable searches and seizures by protecting some important but subsidiary purposes, *viz.*, for example, the protection of owners' rights and proof of chain of custody. See *Fitez v. State, supra*. In this case no question is raised as to the reasonableness of the searches or seizures; they were conducted pursuant to validly issued warrants and thus were based upon probable cause. Entry into 2010 Brunt Street and seizure of the evidence was, when made, entirely

> lawful under the warrants. The officers' failure to timely file their returns does not, we hold, retrospectively nullify or vitiate the warrants or the actions taken under their authority. To exclude evidence validly seized for non-compliance with the ministerial direction of Rule 707 c is too great a price to pay for mere police inadvertence. For these reasons, we find no error in the admission of the seized evidence.

The Court of Special Appeals of Maryland affirmed the lower Court's decision on a legal question that was not properly before the Court. The only question before the Court was whether Mills had a standing or proprietary interest in the evidence. Judge Prendergast's ruling was not before the Court because his ruling took place on April 6, 1970 and no appeal was taken from this decision by either the Defendant or the State of Maryland. The Appeal in this case was filed on June 12, 1970 which did not contest Judge Prendergast's ruling but in fact challenged Judge Harris's ruling as to his standing or proprietary interest in the evidence. The Maryland rule as to time for filing an Appeal if found in *Maryland Rules of Procedure* rule 1012:

> "Whenever an appeal to this Court or an application to this Court for a Writ of Certiorari is permitted by law, the order for appeal or the application for writ of certiorari shall be filed within thirty days from the date of the judgment appealed from."

Since the Court of Special Appeals of Maryland ruled that the Petitioner had a standing or proprietary interest in evidence, then it should have reversed the finding of the lower Court and found the evidence to be inadmissable in Indictment Nos. 6956/69 and 6957/69 Both Courts did not protect the Petitioner's Constitutional right guaranteed to him by the Fourth Amendment as to illegal search and seizure. The lower court committed a constitutional prejudicial error in ruling that the Petitioner had no standing or

proprietary interest in the evidence. Of course the Court Special Appeals of Maryland corrected this error by the lower Court and ruled that the Petitioner did have standing or proprietary interest in the evidence.

As a result of the Court of Special Appeals correcting this error the Court committed a prejudicial Constitutional error by ruling that the Motions to Quash the Warrants and to Suppress the Evidence should be affirmed by ruling on a decision that was not properly before the Court. The Court, by making this ruling, deprived the Petitioner of the protection granted to him by the Fourth Amendment of the Constitution of the United States as to illegal search and seizures. The Court of Special Appeals of Maryland by its ruling was in fact creating an illegal search and seizure which was a total violation of the Petitioner's Constitutional right.

CONCLUSION

For the reasons stated above, certiorari should issue to the Court of Special Appeals of Maryland as to Indictment Nos. 6956 and 6957 and 8858 of the 1969 Docket of the Criminal Court of Baltimore City.

Respectfully submitted,

MORRIS LEE KAPLAN
1305 Court Square Building
Baltimore, Maryland 21202
539-5224

MICHAEL LEE KAPLAN
1305 Court Square Building
Baltimore, Maryland 21202
539-5224

Attorneys for Petitioner

APPENDIX A

REPORTED

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 545

SEPTEMBER TERM, 1970

MOSES MILLS

v.

STATE OF MARYLAND

Murphy, C.J.
Anderson
Morton, JJ.

Opinion by Murphy, C.J.

Filed: June 30, 1971

Appellant Moses Mills was convicted by a jury in the Criminal Court of Baltimore, Judge Charles D. Harris presiding, of (a) conspiracy to violate the narcotics laws, (b) conspiracy to keep and maintain a nuisance house at 2010

Brunt Street, Baltimore, Maryland in violation of the narcotics laws; and (c) conspiracy to violate the narcotics laws with reference to barbiturates.[1] He was sentenced to two consecutive five-year terms and fined $1,000 on each of the first two charges and, as to the third charge, was fined $2,000 and given a five-year sentence concurrent with with the other sentences.

On appeal, he raises fourteen contentions and a miscellany of minor subcontentions. They are best understood in light of a general statement of facts augmented by a recital of specific facts where relevant.

William Mack Holt, Connie Pope, and George Bell testified that they had been employed by appellant and were, prior to their arrests early in 1969, engaged with him in the operation of his Robittusin (codeine-based) "cough syrup house."

George Bell had worked one day in the cough syrup house prior to his arrest but testified to having been one of appellant's customers since 1966. He described the continual relocation of appellant's cough syrup house over a three-year period from Shields Street, to Eddying Street, to Brunt Street,[2] to Roberts Street, and finally to 2010 Brunt Street. He stated that he had seen appellant at the other locations several times; that at one of the other locations, he saw the appellant come by in the morning about 10:00 to collect the money from the previous night's cough syrup sales; and that he had been employed by appellant to sell cough syrup and dummies (barbiturates).

In addition to corroborating Bell's testimony, Connie Pope testified that she had known appellant since 1967 when

[1]The indictments charged that the conspiracy to keep and maintain the nuisance house covered the period from January 1, 1969 to August 1, 1969, and that the other two conspiracies covered the period from August 1, 1968 to August 1, 1969.

[2]Due to an expansion of this operation, two houses were opened up on Brunt Street, one of which moved to Roberts Street.

she first bought cough syrup from him; that thereafter she worked for appellant selling cough syrup and dummies; that she accompanied appellant and "Red" (William Mack Holt) down to a Washington, D. C. pharmacy and from there would sometimes return to Baltimore with twenty cases of cough syrup; that appellant was head of the operation; and that he was present at 2010 Brunt Street almost every day except Sundays. She identified syrup which the police had seized at the 2010 Brunt Street syrup house.

William Mack Holt had known appellant for over fifteen years. When he was released from jail in 1966, appellant had asked him to work for him selling cough syrup. In addition to generally confirming the testimony of Bell and Pope, Holt testified that appellant sold cough syrup and dummies at various locations in the City; that one of these locations was left in his (Holt's) day-to-day control; that appellant gave all the orders, paid the expenses, collected the daily receipts, and paid for and assisted in the transportation of syrup from Washington to the Brunt Street syrup house. Holt testified that appellant paid him $100 a week; that appellant stored his barbiturates in a garage; that following his arrest on May 12, 1969, appellant paid for his release on bail, and instructed him to return to work but to operate away from the Brunt Street house.

Testimony by police officers was adduced to describe (a) three searches of 2010 Brunt Street pursuant to warrants, the seizures of cough syrup and barbiturates as a result, and the arrests of a number of individuals present at the time of the searches, including Bell, Pope, Holt, and Marguerite Wells; (b) a conversation overheard between appellant and Mrs. Wells at her preliminary hearing, and (c) events subsequent to the shooting of appellant on February 28, 1969 outside 2010 Brunt Street.

The three warrant-authorized searches of 2010 Brunt Street were conducted February 22, April 3, and May 12, 1969; they resulted in the seizure of various items including codeine-based Robittusin cough syrup, morphine, heroin,

secobarbital, codeine powder, a "money box," a tally sheet or price list, and narcotics paraphernalia.

Officer Anthony Smith testified that he was present when Marguerite Wells was arrested incident to the search of February 22; that he was also present at a preliminary hearing held shortly thereafter, at which time he overheard appellant say to Mrs. Wells, "I told you not to bring the hard stuff."

Officer John Williams testified that on February 28 he went to 2010 Brunt Street in response to a call, found the appellant lying in the street twenty feet away from the house and heard him shout that he had been shot. Officer Williams testified that appellant denied knowing who shot him but admitted that he had been visiting Connie Pope and a Miss Campbell at 2010 Brunt Street just prior to when he was shot.

I

Of the three searches made at 2010 Brunt Street, the return on one was not made until one month after the search; the return on another was not made until fourteen days after the search; and the return made on the third was not filled in as to the day, and the searching officer could not recall the exact date that it was made. On the basis of these facts adduced at a pretrial hearing the return of the search warrants was deemed to be defective by the hearing judge on the ground that Maryland Rule 707c requires a return within five days. As a consequence, the court concluded that the evidence seized under the warrants could not be introduced against Holt who was found on the premises during one of the searches. Left open was the question whether the appellant had standing to object to the introduction of such evidence. At the trial, it was ultimately concluded that appellant lacked standing to object and, therefore, could not properly move to suppress the evidence alleged to have been illegally seized from the Brunt Street house and from the persons there arrested.

Appellant contends that (1) he has standing to object because there was evidence showing that the cough syrup house at 2010 Brunt Street was set up by him and that he daily regulated and profited from its operations, and (2) the seized evidence was inadmissible since the search warrants were not timely returned.

We think appellant had standing to challenge the searches. In *Walters v. State*, 8 Md. App. 583, we noted that the stake one need possess in searched premises to object to evidence seized therefrom had been discussed in *Jones v. United States*, 362 U.S. 257, and that *Jones* generally held that aside from the owner or one who has a right of possession in the premises, anyone legitimately on the premises searched has standing to object. The "legitimately present non-owner" doctrine has generated much discussion. See *Middleton v. State*, 10 Md. App. 18; *Anderson v. State*, 9 Md. App. 532; *Kleinbart v. State*, 2 Md. App. 183. *Jones* cannot fairly be read to constrict the standing of one having a strong possessory and/or controlling interest in searched premises, but who was not present while the search was being conducted. See *Mancusi v. Deforte*, 392 U.S. 364, and *United States v. Jeffers*, 342 U.S. 48. The evidence indicated that appellant exercised control over the searched premises, giving rise to an inference that no activities would occur there without his permission or over his objection. Therefore, as in *Mancusi*, appellant had a reasonable expectation of privacy with respect to the activities and items within the searched premises. This expectation of privacy is afforded Fourth Amendment protection notwithstanding appellant's inability to show title (*United States v. Jeffers, supra)* or because of the commercial form of the activity conducted on the premises (*Wilson v. United States*, 221 U.S. 361). See also *Katz v. United States*, 389 U.S. 347.

We hold, however, that appellant's standing to object to the introduction of the seized evidence is of no consequence in this case, since we believe that the untimely return of

a search warrant under Rule 707c is no basis for excluding evidence seized under otherwise validly issued and executed warrants.

In *Fitez v. State*, 9 Md. App. 137, we held that the purpose and policies behind Maryland Rule 707a and b (inventory and service of copy) were properly served by viewing those provisions as ministerial, and that a technical violation of those Rules would not preclude admission of evidence seized under otherwise lawfully obtained search warrants.

Maryland Rule 707c provides:

> "The search warrant shall be returned to the issuing judge, or in his absence to another judge of the same circuit in which the search warrant was issued, as promptly as possible and in any event within five days from the date the search warrant was executed or within such earlier time as may be set forth in the search warrant for its return. The return shall be accompanied by a copy of the inventory made pursuant to section a of this Rule."

The marked similarity in form and substance between Maryland Rule 707 c and provisions in other jurisdictions requiring the timely return of a search warrant is readily evident from the most cursory research. The decisions in those other jurisdictions almost uniformly hold that the return of a warrant is a ministerial act and that failure to comply with the return requirement does not render the search warrant defective or the seizure invalid. See *United States v. Haskins*, 345 F.2d 111 (6th Cir.); *Evans v. United States*, 242 F.2d 534 (6th Cir.); *United States v. Averell*, 296 F. Supp. 1004 (E.D. N.Y.); *United States v. Romano*, 203 F. Supp. 27 (D.C. Conn.); *United States v. Gross*, 137 F. Supp. 244 (S.D. N.Y.); *United States v. Baldwin*, 46 F.R.D. 63 (S.D. N.Y.); *People v. Hawthorne*, 258 N.E. 2d 319 (Ill.); *State v. Hunt*, 454 S.W. 2d 555 (Mo.); *People v. Schmidt*, 473 P. 2d 698 (Col.).

Procedural requirements in connection with search warrants are ordinarily intended to safeguard the constitutional right of the individual against unreasonable searches and seizures by protecting some important but subsidiary purposes, *viz.*, for example, the protection of owners' rights and proof of chain of custody. See *Fitez v. State, supra.* In this case no question is raised as to the reasonableness of the searches or seizures; they were conducted pursuant to validly issued warrants and thus were based upon probable cause. Entry into 2010 Brunt Street and seizure of the evidence was, when made, entirely lawful under the warrants. The officers' failure to timely file their returns does not, we hold, retrospectively nullify or vitiate the warrants or the actions taken under their authority. To exclude evidence validly seized for non-compliance with the ministerial direction of Rule 707c is too great a price to pay for mere police inadvertence. For these reasons, we find no error in the admission of the seized evidence.

II

Appellant contends that possession of codeine-based cough syrup is not a crime, and that in any event the burden is upon the State to prove that his possession of such syrup fell outside each and every statutory exception making such possession lawful. We find no merit in the contention for the reasons set forth in *Berlin v. State*, 12 Md. App. 48, and *Reid v. State*, 10 Md. App. 6.

III

As a licensed and registered pharmacist for approximately twenty years, with at least ten years of experience with codeine-based cough syrup, Dr. Irvine Pruce testified as to his procedure in handling Robittusin A.C. cough syrup, as to the existence and nature of State and federal regulations with respect thereto, as to the normal quantity distributed by prescription, as to the proper means of branding said cough syrup, as to its price, as to its effect upon a normal adult, and as to its addictive propensity.

Contrary to appellant's contentions, Dr. Pruce's background indicated that he possessed relevant expert knowledge of a technical nature, and we think his testimony upon those matters was properly admitted. See *Crews v. Director*, 245 Md. 174; *Ager v. Baltimore Transit Co.*, 213 Md. 414; *Long v. Director*, 8 Md. App. 627; *Nelson v. State*, 5 Md. App. 109; *Harding v. State*, 5 Md. App. 230.

IV

Appellant claims that the court erred when it denied his several requests for a mistrial. In reviewing this contention, we note that the granting or refusal to grant a mistrial is within the sound discretion of the trial judge whose decision will not be reversed on appeal except for clear abuse of discretion. *Brunson v. State*, 9 Md. App. 1.

(a) A Juror's Discovery That She Knew One of the Witnesses.

Although all jurors were asked whether they knew any of the witnesses, this procedure did not uncover a juror who knew one of the witnesses by face but not by name and address.[3] After the juror realized she knew the prospective witness, and her knowledge became apparent, the trial judge examined her in chambers and decided that her acquaintance with the witness would not influence her ability to render a fair and impartial verdict.

The relation of a juror to a witness may present an opportunity for prejudice. *Bristow v. State*, 242 Md. 283. However, mere relationship or mere acquaintance is not a sufficient basis for challenging a juror for cause. *Baker v. State*, 3 Md. App. 251, *Borman v. State*, 1 Md. App. 276. We think the juror's acquaintanceship with the witness, who did not testify, did not furnish a basis for a mistrial, particularly so because of the trial judge's examina-

---

[3]The witness was a codefendant whom the State did not intend calling and who did not testify.

tion and finding that the juror could render a fair and impartial verdict.

(b) Improper Argument

The State's Attorney, in argument before the jury, stated "William Mack Holt said on February 22, 1969, that if you buy your cough syrup, you bought it from Moses Mills, he was running the whole thing." The trial judge, who apparently did not hear the remark, stated that it should be clarified that the Assistant State's Attorney was "quoting what some witness said other than the defendant." Viewed in context and in the light of the trial court's rejoinder, it does not appear that this comment either inflamed the passions or misled the reasoning of the jurors. See *Chandler v. State*, 7 Md. App. 646; *Holbrook v. State*, 6 Md. App. 265.

(c) The Trial Judge's Ruling Allowing Mrs. Pope To Refrain From Giving Her Address.

Mindful of *Smith v. Illinois*, 390 U.S. 129, we find no error in allowing to go unanswered the question as to her address since, in this case, the appellant's long acquaintance with the witness dispensed with the need for exploratory inquiry and by means of cross-examination he was able to place the witness' testimony in its proper setting. Compare *Alford v. United States*, 282 U.S. 687.

V

Appellant contends that the State should not have been permitted to have a chemical analysis prepared upon several bottles of cough syrup after those bottles had been offered as State's exhibits for identification. We see no error requiring reversal, no prejudice being shown. Appellant claims that (1) the grand jury's indictment without this evidence was improper, and (2) the statute of limitations had already run on the offenses with which he was charged. The competency and legal sufficiency of the evidence before the grand jury and upon which an indictment

was based, is not ordinarily subject to appellate review. *Presley v. State*, 6 Md. App. 419; *Grimm v. State*, 6 Md. App. 321; *Butina v. State*, 4 Md. App. 312.

Appellant's contention that allowing the State to analyze evidence after the statute of limitations period violates the statute fails to consider that Article 57, Section 11 of the Annotated Code requires only that prosecution be commenced within one year from the time the offense was committed. This time with respect to the offense of conspiracy is measured from the date of the end of the conspiracy. *Scarlett v. State*, 201 Md. 310; *Archer v. State*, 145 Md. 128. In the indictments as initially prepared, the conspiracy was alleged as occurring up to the date of August 1, 1969; the indictments were handed down on October 7, 1969 and December 10, 1969.

This span of time between the alleged end of the conspiracy and the commencement of the prosecution is the crucial time. Therefore, appellant's additional argument that his statute of limitations defense was prejudiced by allowing the State to amend the indictments as to the date of the *beginning* of the conspiracy is utterly without merit. Normally, an amendment as to the date of an offense is a matter of form and not substance. *Tucker v. State*, 5 Md. App. 32. Merely raising a statute of limitations argument is insufficient to make the date a matter of substance. See Annotation, 14 A.L.R. 3d 1297, 1324.

VI

On cross-examination, appellant indirectly impugned Officer Smith's narcotics expertise. He claims that the court erred when it permitted the prosecutor, on redirect examination, to further establish the officer's qualifications.

The trial judge's discretion in permitting inquiry on redirect is wide, particularly where the inquiry is directed toward developing facts made relevant during cross-examination or explaining away discrediting facts. VI *Wigmore on Evidence*, Section 1896. We find no abuse

of that discretion in this case. See also *Spillers v. State*, 10 Md. App. 643; *Jones v. State*, 2 Md. App. 356; *Tingler* and *Wright v. State*, 1 Md. App. 389 (trial judge's discretion to allow reopening of case).

VII

Appellant objected to the testimony of Connie Pope that "Bo-Peep" (a visitor to the Brunt Street house) had put a gun in the dirty linen and "almost half a bag of dummies." "Dummies" had been early described to the jury as barbiturates. Appellant's contention that only a chemical analysis of these items, which were not recovered, is a proper basis for the opinion that they were narcotics is without merit. Mrs. Pope was shown to be an addict who engaged in the sale and use of "dummies." That she possessed sufficient background to make the statement is, we think, clear. See *Mullaney v. State*, 5 Md. App. 248; *Sherrod v. State*, 1 Md. App. 433. The absence of scientific verification, in this case, would go only to the weight and not the admissibility of the evidence.

VIII

The State's witnesses Holt and Bell testified to meeting appellant in 1966 and being asked to work with him in his "cough syrup house." Appellant's objection notwithstanding, this evidence of a prior scheme similar to the present operation was relevant and admissible in establishing the existence of continuing conspiracies manifested by appellant's present operations at 2010 Brunt Street and elsewhere in Baltimore City. *See generally Wilson, Valentine and Nutter v. State*, 8 Md. App. 653; *Wethington v. State*, 3 Md. App. 237.

IX

Witnesses Holt, Bell, and Pope testified, as heretofore indicated, that appellant ran the "cough syrup house on 2010 Brunt Street." Appellant contends that each of the witnesses was an accomplice whose testimony, unless corroborated, was insufficient to sustain his convictions.

As the State admits, the only permissible inference from the record is that the three employees were accomplices of their employer as to crimes within the scope of their employment. See *Sutton v. State*, 10 Md. App. 353. Therefore, corroboration is needed but only slight corroboration is necessary to sustain a conviction. *Christopher and Klimp v. State*, 9 Md. App. 277; *Wise v. State*, 8 Md. App. 61. That corroboration must tend to support a material fact which identifies the accused with the perpetrators of the crime or shows that the accused participated in the crime itself. *Spies v. State*, 8 Md. App. 160; *Boone v. State*, 3 Md. App. 11.

The evidence linking the appellant with the house at 2010 Brunt Street and the occupants therein is adequate to meet the corroboration requirement. Officer Smith testified that at a preliminary hearing appellant told a person arrested in February of 1969 within 2010 Brunt Street that she should not have "brought hard stuff." Officer Williams testified to conversation with appellant after he was shot outside 2010 Brunt Street wherein he said that just prior to the time of the shooting he was visiting friends at 2010 Brunt Street. We think this evidence independently demonstrates appellant's connection to the premises in question and to its occupants Bell, Holt, and Pope, and is sufficient corroboration. We hold that this corroborated testimony of the accomplices provided a sufficient evidentiary predicate to justify the trial judge denying appellant's motions for judgment of acquittal and permitting the case to go to the jury. The indictments charged that appellant conspired with Holt and others and the record indicates that there was evidence sufficient to establish all requisite elements of the conspiracies.[4] *Randolph v. State*, 10 Md. App. 89; *Regle v. State*, 9 Md. App. 346; *Jones v. State*, 8 Md. App. 370.

---

[4] Appellant makes no contention with respect to the merger of any of the conspiracies and we do not consider the question.

X

That the trial judge is permitted a wide discretion as to the form of instructions is clear. See *Nora Cloney & Co. v. Pistorio*, 251 Md. 511; *Lemons v. Chicken Processors*, 223 Md. 362. Although instructions should be accurate, complete, definite, certain, non-repetitious, consistent, and without undue prominence to any particular matter, the trial court's discretion as to wording, order, and amount of detail in an instruction will not be disturbed on appeal absent a clear abuse of that discretion. Applying these considerations to the instructions given, we find no merit in appellant's various objections to the court's instructions.

(a) The Instruction as to Reasonable Doubt.

In its instruction to the jury, the trial court stated:

> "You have been told by counsel that the defendant is innocent until proven guilty beyond a reasonable doubt. I advise you that that is not a correct or precise statement of the law. The defendant in this case, as in any criminal case in Maryland, is presumed to be innocent until proven guilty beyond a reasonable doubt. He is not clothed in innocence, but he is clothed in the presumption of innocence."

The objection to the trial court's use of the term "presumed to be innocent" instead of appellant's suggested phrase "is innocent" is without merit. Similar instructions have been deemed proper. See *Thompson v. State*, 4 Md. App. 31.

(b) Failure to Instruct the Jury as to a Statutory Exemption of the Narcotic Laws.

Since the burden of proving that an accused falls within a statutory exception is upon the accused (Article 27, Section 29[e] (1967 Repl. Vol.)), the trial court did not err in refusing to instruct the jury that no evidence was adduced by the State showing that appellant was outside

the pale of the statutory exception in question. See *Reid v. State, supra.* The requested instruction would have misled the jury as to the proper burden of proof and hence would have been impermissible. See *Wintrobe v. Hart,* 178 Md. 289; *Provident Trust Co. v. Massey,* 146 Md. 34; *B & O R.R. Co. v. Boyd,* 67 Md. 32.

(c) The Law of Conspiracy.

Appellant contends that the court's instructions to the jury "gave only the State's side * * * without giving the defense an opportunity to argue otherwise." It is elementary that each part is entitled to have his legal theory of the case submitted to the jury if there is any competent evidence to support it. In the absence of a showing of a specific denial of an instruction supported by the evidence, appellant's contention is lacking in merit. Compare *Gaskins v. State,* 7 Md. App. 99; *Halcomb v. State,* 6 Md. App. 32. Nothing in the record even remotely suggests that the court refused to permit appellant to argue to the jury contrary to its instructions. See *Lewis v. State,* 2 Md. App. 678.

XI

Appellant received a five-year concurrent sentence on the conspiracy to violate the narcotic laws with reference to barbiturates. At the disposition hearing it was made clear that appellant was charged with conspiracy to violate Article 27, Section 313C (1967 Repl. Vol.) which carried a maximum sentence for the first offense of one year imprisonment and a $250 fine. The five-year sentence for conspiracy to violate Section 313C appears to be in conflict with Code, Article 27, Section 38, which provides:

> "The punishment of every person convicted of the crime of conspiracy shall not exceed the maximum punishment provided for the offense he or she conspired to commit."

Section 38 would prohibit a five-year sentence under these circumstances and we must therefore vacate that sentence and remand for resentencing under this indictment.

JUDGMENTS AS TO INDICTMENTS 6956 AND 6957 AFFIRMED; JUDGMENT AS TO INDICTMENT 8858 AFFIRMED, EXCEPT AS TO THE SENTENCE; CASE REMANDED FOR IMPOSITION OF A NEW SENTENCE IN ACCORDANCE WITH THIS OPINION; COSTS TO BE PAID BY APPELLANT.

APPENDIX B

MOSES MILLS

v.

STATE OF MARYLAND

IN THE
Court of Appeals
of
Maryland
Miscellaneous Docket No. 209
September Term, 1971
(No. 545, September Term, 1970
Court of Special Appeals)

O R D E R

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED by the Court of Appeals of Maryland that the said petition be and it is hereby, denied.

[SEAL] /s/ Hall Hammond
Chief Judge

Date: November 9, 1971.